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No. 04-161

IN THE

Supreme Court of the United States

DJ MANUFACTURING CORPORATION,

Petitioner,

—v.—

TEX-SHIELD, INC., XYZ INSURANCE CO., CREATIVE APPAREL, BLUECHER USA, BLÜCHER GMBH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals committed reversible error by finding a Puerto Rico statute to be ambiguous and examining legislative history as an aid in the statute's interpretation?

CORPORATE DISCLOSURE STATEMENT

Respondent Tex-Shield, Inc. is wholly-owned by Bluecher USA, Inc. Bluecher USA, Inc. is wholly-owned by Blücher GmbH. Neither Tex-Shield, Inc., Bluecher USA, Inc. nor Blücher GmbH is owned ten percent (10%) or more by any publicly-held company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari ("Petition").

STATEMENT OF THE CASE

A. Nature of the Claims

Petitioner DJ Manufacturing Corp. ("DJ" or "Petitioner") is a contractor based in Puerto Rico that manufactures garments for the U.S. military. DJ was a certified participant in the Small Business Administration's Section 8(a) government contract set-aside program for small, disadvantaged businesses. Respondent Tex-Shield, Inc. ("Tex-Shield") is a supplier of "Chemical Protective Cloth" (sometimes referred to as "Saratoga Filter Cloth" or "filter cloth") that is made by Tex-Shield's corporate parent, Blücher GmbH, and used by contractors such as DJ.[1]

The U.S. Defense Department issued a solicitation (the "DPSC Solicitation") for proposals from Section 8(a) contractors to manufacture chemical-protective suits, and required that such suits be made from Blücher's Chemical

[1] Contrary to the Petition's implication (at 2-3 & n. 2), Tex-Shield did not manufacture finished garments at the time of the events at issue.

Protective Cloth, for which Tex-Shield was the sole approved source.[2]

DJ requested from Tex-Shield a price for Chemical Protective Cloth, with outer shell material, pre-cut into "kits" that DJ could simply assemble without additional cutting. Another Section 8(a) business, Creative Apparel Associates, asked Tex-Shield for and was quoted a price for the Chemical Protective Cloth and outer shell material without any pre-cutting. Both DJ and Creative Apparel submitted bids to the DPSC, which awarded the contract to Creative Apparel. The price Tex-Shield quoted to Creative Apparel for the uncut cloth was lower than the price Tex-Shield quoted to DJ for the pre-cut kits, which DJ claims is the reason it lost the bidding.

B. Proceedings Below

On March 31, 1997, Petitioner filed its complaint against Tex-Shield in the District Court for Puerto Rico alleging violations of federal and Puerto Rico antitrust statutes in connection with the DPSC Solicitation and a previous procurement for the Air Force that DJ had won, on which Tex-Shield had served as DJ's subcontractor to supply cloth.

On Tex-Shield's motion, the District Court stayed the action pending arbitration of the Air Force procurement claims. *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 998 F. Supp. 140 (D.P.R. 1998). The arbitration resulted in an award to Tex-Shield of more than $500,000, which the District Court confirmed. *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 189 F.R.D. 34

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[2] The Petition incorrectly asserts (at 2) that the Department of Defense requires that all of its biological and chemical protective garments be made with Saratoga Filter Cloth.

(D.P.R. 1999). Through the subsequent course of this litigation, DJ has forestalled paying the award.

After the District Court confirmed the arbitral award, DJ served an amended complaint that added a claim under a different provision of the Puerto Rico Anti-Monopoly Act, 10 L.P.R.A. § 264. Section 264 provides:

> It shall be unlawful to sell, contract to sell, offer to sell, or participate in any step for the sale of articles in Puerto Rico, after making due allowances for differences in costs incident to the delivering of goods in Puerto Rico and the costs of handling such goods in Puerto Rico, at prices which are substantially different from the prices charged or quoted by such sellers for goods of the same grade or quality to buyers located outside of Puerto Rico, when such difference in price is granted with the purpose of destroying competition or eliminating a competitor located in Puerto Rico.

10 L.P.R.A. § 264.

DJ had learned earlier in the litigation that the laws against price discrimination, Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and its Puerto Rico law counterpart, 10 L.P.R.A. § 263, are inapplicable where, as here, there were not two completed sales of goods of like grade and quality. DJ contended that Section 264 was the same as the Robinson-Patman Act except without the requirement that there be two completed sales.

On Tex-Shield's Rule 12(b)(6) motion, the District Court dismissed DJ's complaint with prejudice. *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109 (D.P.R. 2002). The Court rejected DJ's argument that Section 264 is a general price discrimination provision. On the basis of the statutory language and legislative history, the District Court held instead that Section 264 "is really meant to be a state anti-dumping provision" that prohibits "the sale of articles in Puerto Rico at prices that are less than their market value in their domestic market, with the purpose of injuring or destroying competition in Puerto Rico." 275 F. Supp. 2d at 125.

Petitioner appealed the District Court ruling solely with regard to Section 264. DJ argued that the phrase in the statute purporting to prohibit "prices which are substantially different" mandated a broader application than adopted by the District Court. The First Circuit initially reversed but, on Petition for Rehearing, reconsidered. *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 347 F.3d 337 (1st Cir. 2003). The Circuit Court determined that the statutory phrase relied upon by DJ—"prices which are substantially different"—must be considered in the context of the entire statute, in particular the requirement that the differences in price be granted by the seller "with the purpose of destroying competition or eliminating a competitor located in Puerto Rico." This second statutory phrase, the First Circuit found, leads to an interpretation contrary to DJ's and renders Section 264 ambiguous:

> Although it may appear quite obvious that the word "different" could encompass both higher and lower prices, this does not mean that the statute is unambiguous and that it clearly encompasses DJM's claim.

> When we consider whether the statute as a whole encompasses DJM's claim, its ambiguity emerges. In particular, here we have a situation where the alleged price discrimination is having a potential detrimental effect not on the seller's competition (horizontal competition or competitors), but rather on the buyer's competition (vertical competition or competitors). On its face, the statute does not clearly encompass claims involving harm to vertical competitors caused by the charging of higher prices in Puerto Rico.

347 F.3d at 340-41.

Because it viewed the statute as ambiguous in scope, the Circuit Court examined the legislative history. As the Court noted, the Senate committee report stated explicitly that the prohibition in Section 264 is "limited to classic dumping." 347 F.3d at 342. The Court also cited commentary by the co-sponsor of the Act to the effect that the purpose of Section 264 is to bar dumping and that the "phrase 'substantially different' was used with the intention of outlawing 'lower prices.'" *Id.*

The First Circuit concluded that the legislative history clarifies that Section 264 is an "an anti-dumping statute" meant to apply only to the charging of lower prices in Puerto Rico to destroy the supplier's competition there. Having vacated its initial decision, the Circuit Court on reconsideration thus unanimously affirmed the District Court. 347 F.3d at 343. DJ's subsequent petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

The case presented to the lower courts and now to this Court is one of garden-variety statutory interpretation. The decisions below represent a straightforward application of methods of statutory interpretation prescribed in the decisional law of this Court and lower court decisions following this Court's precedents. The interpretation of Section 264 adopted by the lower courts fully squares with the intention of the legislature as manifest both in the language of the statute and in the legislative record.

There is thus no circumstance that would weigh in favor of review by this Court. The decisions below do not conflict with any decisions of this Court or any other Court of Appeals. The proceedings below did not depart from the accepted course of judicial proceedings. The decisions below do not raise any important federal question that this Court should settle; indeed, no question of federal law has been presented to either the Court of Appeals or this Court. In short, the Petition invokes none of the considerations favoring a grant of certiorari delineated in Rule 10 of the Supreme Court or in this Court's decisional law, and it should be denied.[3]

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[3] The Petition argues (at 6) that the integrity of government procurements, the "public fisc" and the Puerto Rican economy all are grounds for granting the writ. DJ's contentions in this regard are unsubstantiated at best—and otherwise simply false—and have no bearing on what issues would be before this Court if it were to grant the Petition.

I. THERE IS NO CONFLICT WITH SUPREME COURT PRECEDENT.

The Court of Appeals' decision does not conflict with decisions of other federal or state courts. DJ argues that Section 264 could be interpreted as applying to DJ's price discrimination allegations by reading Section 264's phrase "prices which are substantially different" in isolation from the rest of the words of the statute. The Court of Appeals declined to do so, holding instead that it "must consider the phrase in the context of the entire statutory provision in order to determine if the statute covers situations such as the one alleged here." *DJ Mfg. Corp.*, 347 F.3d at 340. That holding is consistent with Supreme Court precedent and common sense. *See, e.g., Allied Chem. and Alkali Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971) (indicating that courts "must not be guided by [a] single sentence or member of [a] sentence, but look to the provisions of [the] whole law"); *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

The Circuit Court determined that the statute as a whole was ambiguous. Concluding therefore that "consultation of other sources would be not only prudent, but necessary," 347 F.3d at 341, the Circuit Court examined the legislative history. This, too, is textbook statutory interpretation, employed without controversy in numerous Supreme Court opinions. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990) (reviewing legislative history when confronted with differing plausible interpretations of statutory term "burglary"); *United States v. R.L.C.*, 503 U.S. 291, 297-99 (1992) (reviewing legislative history where statutory text

was consistent with differing interpretations of statutory term "authorized").

Far from being "in conflict with almost two centuries of Supreme Court decisions," as petitioner charges (Petition at 6), the Court of Appeals' decision expressly relied on clear Supreme Court precedents for statutory interpretation, and applied the precedents in a straightforward way to the facts of this case.

II. LEGISLATIVE HISTORY AND LEARNED COMMENTARY CONFIRM THAT PUERTO RICO INTENDED SECTION 264 TO BE AN ANTI-DUMPING STATUTE, APPLICABLE ONLY TO LOWER PRICING THAT DESTROYS THE SUPPLIER'S PUERTO RICO COMPETITION.

Tex-Shield provided both the District Court and the Court of Appeals with relevant portions of the legislative record—including hearing transcripts and committee reports—all of which support the conclusion that the conduct intended to be proscribed by Section 264 is dumping, that is, below-market pricing that is calculated to destroy competitive sellers. In addition to the materials cited earlier, the joint report of the House Juridical Committee and Committee of Commerce and Industry on the final version of the bill clearly ruled out reading Section 264 as a secondary line price discrimination statute:

> This provision punishes dumping (overstocking the market with merchandise from another place at prices substantially lower than market price) with the purpose of destroying competition or of eliminating a competitor in Puerto Rico . . . . The prohibition is limited to classic dumping, that is, overstocking of our market knowingly causing economic harm.

May 11, 1964 Diario de Sesiones, Vol. XVIII, at 1423.[4]

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[4] The Diario de Sesiones is the official record of proceedings and debates in the Legislative Assembly of Puerto Rico.

The Petitioner has never offered any legislative history in support of its interpretation and, instead, "merely analyze[d] the excerpts provided by its opponents." 347 F.3d at 342, n. 6. DJ relies on some vague language in an article by Arturo Estrella, a co-sponsor of the legislation, to the effect that anti-dumping was the statute's "main purpose" and that Section 264 could serve as a complement to federal anti-dumping and price discrimination laws. On this basis, DJ contends that Estrella indicates that the legislature meant this provision to reach both higher and lower prices. Petition at 11.

DJ's argument is unpersuasive and is put to rest by the following statement by Estrella about Section 264:

> The phrase "substantially different" was used with the intention of outlawing "lower prices." This is clear in the legislative record and is an inevitable conclusion because of the requirement that the price be granted "with the purpose of destroying competition or eliminating a competitor located in Puerto Rico."

Arturo Estrella, *Antitrust Law in Puerto Rico*, XVIII Revista del Colegio de Abogados Num 3 (May 1968) 505, 625, *quoted in part in DJ Mfg. Corp.*, 347 F.3d at 342.

Petitioner thus supplies no basis for questioning the Circuit Court's reading of the legislative history and learned commentary.

III. CERTIFICATION TO THE PUERTO RICO SUPREME COURT IS UNWARRANTED.

Certification is a matter of discretion. A court is not obliged to certify a question even when there is doubt as to local law. *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974).

The Circuit Court was well aware that it could certify an issue to the Puerto Rico Supreme Court; in its respective petitions for rehearing, each side identified certification as an alternative to ruling against it. Yet, the Court obviously concluded that the statutory language, legislative record and learned commentary were more than sufficiently clear to enable it to interpret Section 264. There is no reason to upset this exercise of discretion by the Circuit Court.

This Court has indicated in dicta that it would defer to First Circuit interpretations of Puerto Rican law. *Chardon v. Fumero Soto*, 462 U.S. 650, n. 5 (1983). So, too, should this Court defer to the First Circuit's judgment as to whether to certify a question to the Puerto Rico courts, especially where, as here, there is such overwhelming support in the statutory materials for the lower court's interpretation of the statute.

CONCLUSION

In sum, because the Court of Appeals' interpretation of Section 264 is well within the accepted and usual course of judicial proceedings, this is not an appropriate case for Supreme Court review. *See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998) (denying certiorari because the Supreme Court "does not normally make an independent examination of state law questions that have been resolved by a court of appeals"). The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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Dated: September 10, 2004

I, Timothy K. Beeken, a member of the bar of this Court, hereby certify under penalties of perjury that I caused three copies of the annexed Brief in Opposition to be served on September 10, 2004 by U.S. Mail, postage prepaid, upon counsel for Petitioner:

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